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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
	)	

COMMENTS OF THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS OF THE CITY OF NEW YORK ON THE NOTICE OF INQUIRY ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND FRANCHISE FEES

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SUMMARY

Years before the Telecommunications Act of 1996 (the "Act") was enacted, the City of New York was successfully cultivating a competitive and dynamic telecommunications market. The City has been franchising competitive telecommunications providers since 1990, and to date the City has granted competitive telecommunications franchises to ten different entities. The City embraces competition in the provision of telecommunications service and the benefits it brings to consumers. But it also is true that the proliferation of competition – and the resulting installation of facilities and equipment in the City's rights-of-way – makes it imperative that the City retain its historical authority to protect its public assets.

Congress specifically recognized the importance of local autonomy in this regard in enacting Section 253 of the Act. Thus, Section 253(c) creates a "safe harbor" that confirms the ability of a local government to manage its public rights-of-way and obtain fair and reasonable compensation for the use thereof. Moreover, this subsection ensures that local governments can seek rent for the use of their property in whatever manner is best tailored to the specific needs of their jurisdiction, provided they do so in a competitively neutral and nondiscriminatory manner.

The "competitively neutral and nondiscriminatory" qualifier, however, does not mandate that all providers be treated alike. It requires only that similarly situated providers be treated in a similar manner to one another. This pragmatic rule allows local governments to tailor their ordinances and franchise requirements to acknowledge the substantial differences among incumbent carriers such as Bell Atlantic and the array of

competitive providers (who vary widely in technology, the degree to which they use their own facilities and the customers that they intend to serve) in each jurisdiction.

In managing its rights-of way, the City has conditioned access to public property on a carrier's agreement to reasonable conditions that fall clearly within the scope of the City's authority. To the extent that any court decision has indicated that the types of reasonable conditions required by the City are beyond the scope of Section 253(c), such decision is wrong. Even if the conditions imposed by the City were outside of Section 253(c)'s "safe harbor" – which they clearly are not – such conditions still would be permissible under Section 253(a), which only proscribes State and local governments from acting so as to prohibit (or have the effect of prohibiting) the provision of telecommunications service.

The Commission should take this opportunity to clarify that Section 253 affords local governments maximum flexibility to address their unique situations on a case-by-case basis, consistent with the goals of the Act.

INTRODUCTION

The Department of Information Technology and Telecommunications of the City of New York (the "City") submits these comments in response to the Federal Communications Commission's (the "Commission") Notice of Inquiry with respect to Section 253 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 253.[1]

The City has sought and enjoyed competition in the telecommunications marketplace beginning years before the adoption of the Act. Between 1990 and 1996, the City granted franchises to six different competitive telecommunications companies, and since 1996 has granted franchises to four other companies, for a total of ten different franchised telecommunications providers. The City continues to receive and routinely processes applications for additional competitive franchises. Competitive systems built by such City franchisees as Metropolitan Fiber Systems (now a part of MCI WorldCom) and Teleport (now a part of AT&T) are having a dramatic impact on the telecommunications marketplace in the City. Currently, construction is under way by City-franchised companies such as Level 3, Nextlink and RCN on facilities that will expand to an even greater degree the competitive nature of the City's telecommunications market. Clearly, the City's franchising process is neither actually prohibiting nor

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[1] See In re Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Dkt. No. 99-217, CC Dkt. No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Dkt. No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Dkt. No. 96-98 (rel. July 7, 1999).

effectively prohibiting the competitive provision of telecommunications in New York City. Indeed, quite to the contrary, the City's policy is to encourage and cultivate such competition. In short, the City welcomes telecommunications competition and the benefits it brings to the people of New York.

Along with these benefits, though, come certain burdens on the public infrastructure. As more and more telecommunications carriers seek to use public rights-of-way – which, in most cases, involves installing conduit, trenching and cutting streets – the impact on the City's rights-of-way increases. Thus, it is crucial that local governments retain sufficient authority to protect public property. Congress understood this, and enacted Section 253 so as to preserve the traditional authority of local governments to manage and administer their rights-of-way and charge fair and reasonable compensation for the use thereof.

The City believes that Section 253 must be interpreted by the Commission so as to preserve the ability of local governments to protect public assets. Specifically, the Commission should focus on at least three issues of critical import to local governments. First, local governments must have considerable discretion in deciding what form of fair and reasonable compensation best suits their local needs, including obtaining rent for the use of their property. Second, the Commission should clarify that the "competitively neutral and nondiscriminatory" requirements of Section 253(c) only mandate that similarly situated providers be treated in a like manner, not that all carriers be treated the same. Third, Section 253 should be construed broadly, as intended by Congress, to allow local governments to determine the most appropriate way to manage and protect the public rights-of-way, in light of local facts and circumstances. To that end, the

Commission should confirm that Section 253 does not limit the authority of local governments with respect to public property as long as the exercise of such authority does not prohibit or have the effect of prohibiting the provision of telecommunications services. Each of these issues is explored fully below.

I. Local Governments Are Entitled to Obtain Appropriate Rent As Compensation for the Use of Public Rights-of-Way

Section 253(c) expressly preserves the authority of local (and State) governments "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." The Act does not explicitly define "fair and reasonable compensation," which is not surprising since there is not one answer for all localities and there are a multitude of ways in which public rights-of-way may be used. Indeed, the very idea of "fair and reasonable compensation" is, by necessity, one that must be addressed on a jurisdiction-by-jurisdiction basis, in light of the unique circumstances and conditions in each locality. It is crucial for the Commission, however, to make clear that local governments are not precluded from charging rent for the use of their rights-of-way, including rent calculated as a percentage of gross revenue. The Commission should put to rest, once and for all, the claims of some carriers that Section 253 limits compensation to the recovery of out-of-pocket costs.

Compensation for "use," of course, includes, at a minimum, reimbursement for the costs to the local government of having lines or equipment installed in the public rights-of-way. Such items may include the costs of repairing or replacing the streets or other rights-of-way that are excavated, the costs for any government personnel that are needed to ensure that the installation does not endanger public safety, and costs related to acquiring, maintaining and improving the public rights-of-way.

The statute, however, does not limit local governments to reimbursement for their costs. Indeed, there are a host of other "costs" which should be considered, ranging from the additional costs a locality must bear to repair the streets sooner as a result of multiple street cuts that shorten the life of the street, to the costs of accidents and injuries that occur as a result of barriers in streets, or disruptions to normal public crossings and pathways and the disruption to commerce.

In any event, Section 253(c) does not even refer to "costs"; rather, it refers to "compensation," and courts have ruled that this difference is important: "the fact that Congress used the word 'compensation' in lieu of the word 'costs' in [Section 253(c)] is strong evidence against construing the term to limit municipalities to strictly their costs related to telecommunications providers use of their right-of-ways." TCG Detroit v. City of Dearborn, 16 F. Supp.2d 785, 789 (E.D. Mich. 1998) ("Dearborn"). The Dearborn court further elaborated:

> The term "fair and reasonable compensation", although not explicitly defined by Congress, clearly enables a municipality to charge compensation for the use of its right-of-ways as the words "fair and reasonable" are commonly understood. Any determination of whether compensation is "fair and reasonable" is not amenable to a strict test. Rather, fair and reasonable is determined by examining the totality of the facts and circumstances.

Id. (emphasis added). Although "fair and reasonable compensation" cannot be defined precisely, because it requires a case-by-case determination, it is clear that the concept is broader than simply "costs" and can clearly include the value of the use of rights-of-way.

In particular, Section 253(c) preserves the authority of local governments to charge rent for the use of their property.

> [T]here is nothing inappropriate with the city charging compensation, or "rent", for the City owned property that [a telecommunications provider] seeks to appropriate for its private use. The statute specifically allows it. *See* 47 U.S.C. § 253(c) (this section does not affect the authority of the city to "require fair and reasonable compensation from telecommunications providers . . . for the use of the public rights-of-way . . . .").

Id.[2]

The Dearborn court, in evaluating the city's compensation scheme, examined four factors to determine whether the assessment of a franchise fee based on 4% of gross revenue was fair and reasonable: (1) the extent or amount of the provider's proposed use of the public rights-of-way; (2) the willingness of other providers to agree to similar terms and conditions; (3) the course of dealings between the parties; and (4) whether the fees were "so excessive that it is likely to render doing business unprofitable". Id. at 790-

[2] As the Dearborn court recognized, over a century ago the United States Supreme Court upheld the right of a municipality to seek rent from a company that sought to place telegraph poles on city land. See Dearborn, 16 F. Supp.2d at 789. (*quoting* City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) ("Western Union")). The Supreme Court reasoned in Western Union that although there was not a technical landlord-tenant relationship, allowing the erection of telegraph poles on public property amounts to giving "'use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.'" Id. (*quoting* Western Union, *supra*, 147 U.S. at 99)). The same result applies today.

91 (holding that the ordinance and franchise agreement, including the fee component, do not violate the Act).

The Dearborn court is not alone in acknowledging local government authority under Section 253(c) to obtain compensation beyond mere costs. A federal court in New York recently said that an interpretation of Section 253(c) that restricts local governments to compensation for the costs of maintaining and improving public rights-of-way "may too severely limit" the concept of "fair and reasonable." Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey, 1999 WL 494120, *6 (S.D.N.Y. July 13, 1999). The Omnipoint court cited the reasoning and four part test of Dearborn, but found that it need not decide the issue due to the procedural posture of the case. Id. at *7.[3]

At least one federal court has taken a contrary view – that compensation equates to costs. A federal court in Maryland (which was considering a franchise fee based on 3% of gross revenue) held that "any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)." Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, ___ F. Supp.2d ___, 1999 WL 343646 *10 (D. Md. May 24,1999) ("Prince George's").

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[3] Similarly, in AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp.2d 582, 593 (N.D. Tex. 1998) ("Dallas I"), while the Court held that Dallas' imposition of a franchise fee based on 4% of gross revenue violated the Act, it expressly refrained from defining the scope of reasonable compensation. Id. Rather, the Court focused on the inclusion of revenue derived from long-distance services (which, evidently, could not be included as a matter of Texas state law) and from resale. Id. The Court did not, however, question Dallas' ability to charge fair and reasonable compensation that included more than costs.

The Court further indicated that "[f]ranchise fees . . . may not serve as general revenue-raising measures." Id. The Court explained its reasoning as follows:

> The appropriate benchmark is not the "value" of [the company's] "privilege" of using the County's public rights-of-way to provide telecommunications services in [the] County. Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that [the Company] actually uses. Furthermore, to be "fair and reasonable," these costs must be apportioned to [the Company] based on its degree of use, not its overall level of profitability.

Id. at *11.[4]

The Commission should make clear that the analysis in Prince George's is wrong. There simply is no support in the statute for limiting "fair and reasonable compensation" to the costs incurred in maintaining and improving the public rights-of-way. Had Congress meant to so limit a municipality's authority it could have done so. Instead, Congress clearly provided that local governments retain their historical authority to be compensated for the use of their property by charging rent.[5]

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[4] The Prince George's court specifically disagreed with the interpretation adopted in Dearborn, *supra*. See Prince George's, 1999 WL 343646 at *11, n. 27.

[5] Congress and the Commission have recognized that seeking fair compensation for the use of a public resource is consistent with the promotion of telecommunications competition. For example, over the past several years Congress and the Commission have sought compensation for access to radio frequency spectrum. See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd. 2348 (1994) (concluding that PCS services are subject to an auction process). The federal government has collected, and expects to continue to collect, billions of dollars in compensation – completely unrelated to any notion of "costs" – from telecommunications providers paying for access to the radio frequency spectrum (the elctromagnetic equivalent to public rights-of-way), while promoting the creation of a competitive telecommunications marketplace as a key priority. It would be entirely inconsistent for the Commission to conclude that when state and local governments seek fair and reasonable compensation for the use of public rights-of-way it is anticompetitive, but when the federal government seeks such compensation it is good policy.

Once it is determined that "fair and reasonable compensation" includes rent for the use of public rights-of-way, the next question is how should local governments calculate that compensation? Various options exist, such as charging on a per linear foot basis or charging the telecommunications provider a percentage of its gross revenue generated by the facilities and equipment occupying the public rights-of-way. Tellingly, Congress did not dictate any particular methodology in the Act. This is because the decision of how to compensate the local government is an inherently local question that will vary based on the unique situations in each jurisdiction. Thus, it is imperative that local governments have the flexibility to develop appropriate compensation mechanisms.

One method that enjoys widespread use is the assessment of a fee equal to a percentage of gross revenue generated within the jurisdiction. This method (which was approved by the Dearborn court) is particularly attractive because it is easy to use and it encompasses both the costs of maintaining and improving public rights-of-way and a rental fee for the use of local government property.[6] In fact, the utility of compensation for the use of public rights-of-way based on a percentage of gross revenue is recognized by its inclusion elsewhere in the Federal Communications Act. See, e.g., 47 U.S.C. § 542(b) (authorizing local governments to collect a franchise fee from cable operators of 5% of gross revenue, where the pattern of gross revenue fees had been established for decades).

[6] Ascertaining the components of "gross revenue" is a determination that is best made on a case-by-case basis, depending on the proposed use of the facilities and equipment that will occupy the public rights of way. Here too, local governments should be afforded considerable flexibility, subject only to the "fair and reasonable," "competitively neutral" and "nondiscriminatory" requirements of Section 253(c).

Because no uniform historical method of compensation had evolved with respect to use of rights-of-way by telecommunications providers, the Act does not proscribe (or prescribe) any given method of compensation. Since Section 253(c) is directed to preserving local authority over public rights-of-way, the most sensible interpretation of the Act is to afford local governments maximum flexibility in crafting reasonable and lawful methods of compensation. The only limitation on fair and reasonable compensation is whether a fee is so high as to prohibit or have the effect of prohibiting entry. Clearly, a 5% gross revenue fee – which has been the fee for years in the City's telecommunications franchises – would not come close to violating that test.[7]

II. Section 253(c) Does Not Require That A <u>Local Government Treat All Carriers Identically</u>

As noted, Section 253(c) requires local governments to act in a "competitively neutral and nondiscriminatory" manner. It does not, however, require that all telecommunications providers be treated alike – or that they all pay the same compensation for using rights-of-way. Local governments are confronted with an array of different carriers engaging in different activities, and they need the flexibility to take these differences into account.

[7] The floor debate in the House of Representatives regarding the language that ultimately was adopted as Section 253 of the Act is unambiguously clear on this point. <u>See</u> 141 Cong. Rec. for August 4, 1995 at H8460-61. Both the proponents and opponents of the language that became Section 253 acknowledged during this debate that such language would authorize franchise compensation based on percentages of gross revenue, and that the appropriate percentage would be left to the discretion of local franchising authorities. Opponents pointed out that local franchising authorities would be able to charge in the range of eight, ten or eleven percent of gross revenue. Proponents agreed, and noted that Section 253 "explicitly guarantees that cities have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way." <u>See</u> <u>id</u>. (Statement of Representative Barton). The <u>Prince George's</u> court's acceptance of a selective and out-of-context excerpt from this floor debate unfortunately led that court to a serious misunderstanding of Congress' intent. <u>See</u> <u>Prince George's</u>, *supra*, 1999 WL 343646, at *11, n. 26.

This construction of Section 253(c) is confirmed by reference to the Act's legislative history. Representative Stupak, whose amendment rejected the use of a "parity" standard as the guidepost for local government authority, stated:

> Local governments must be able to distinguish between different telecommunications providers . . . . The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.

141 Cong. Rec. for August 4, 1995 at H 8460. The House ultimately rejected the "parity" standard, as reflected in the final language of Section 253(c).

Courts considering Section 253(c) also have recognized that it does not demand equal treatment among all providers. In Dearborn, the court held that "the explicit language of the statute does not require such strict equality. All that is required is that the compensation sought be non-discriminatory and competitively neutral." Dearborn, 13 F. Supp.2d at 792. Similarly, in Dallas I, the court held that "being competitively neutral does not require cities to treat all providers identically and to ignore the significant distinctions among them. The most important and relevant distinction in this context is the different amounts of City rights-of-way that each company uses to provide its services." 8 F. Supp.2d at 593-594. The Commission, too, has suggested that Section 253(c) allows local governments to consider whether different providers are similarly situated in deciding how to treat them. "At the very least, this mandate of competitive neutrality requires Cities to treat similarly situated entities in the same manner." In re Classic Telephone, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 13,082, ¶ 37 (1996).

Not only is this interpretation consistent with Congress' intent, but it also reflects the reality of the dynamic telecommunications market. Different providers, in the same jurisdiction, will offer different packages of services. For example, unlike the ILECs, such as Bell Atlantic, many carriers do not offer universal telephone service to each household in the municipalities they enter. In addition, a number of competitive providers seek access to public rights-of-way only in high-volume commercial areas, while others plan to offer residential service. There simply is no basis, statutory or otherwise, to require that the City treat all of these entities the same.

The City is particularly concerned about the ability of local governments to recognize differences among different carriers because of the potential for the historical treatment of the Bell System to hamstring its ability to continue to obtain appropriate compensation from its franchises. In the City, Bell Atlantic (and its predecessors) has had access to public rights-of-way for a century without having to obtain a local franchise or pay compensation, based on a nineteenth century decision by the New York state legislature, that the development of a ubiquitous telecommunications system serving all residents was a valuable public benefit. Since Bell Atlantic built such a ubiquitous system and has shouldered universal service obligations to ensure that all citizens have access to basic service at affordable prices, it has had such unfettered use of the streets.

The situation today, in which multiple telecommunications providers are building their own networks designed principally to serve large business customers who now have competitive choices, is very different. These telecommunications providers, however, are asserting that since Bell Atlantic has not had to pay franchise fees, they should not have to pay either. This claim has no foundation in Section 253.[8] The historical relationship between local governments and a monopoly provider developing the first telephone systems for broad public use is no model for the appropriate treatment of telecommunications providers who are vying in a competitive marketplace to serve selected, high-end customers. Nothing in the Act suggests that local governments should be prevented from taking appropriate action – including obtaining appropriate compensation – with respect to this generation of carriers. Simply put, these telecommunications carriers are not similarly situated, and treating them differently does not violate the Act's directive for "competitively neutral and nondiscriminatory treatment." Moreover, it may well be appropriate for the City to revisit the obligations of Bell Atlantic to require it to pay compensation for their use of rights-of-way. When and how that change occurs, however, should not affect the obligation of telecommunications providers, who are not similarly situated, to pay for their own use.

The Commission should state unequivocally that Section 253(c) requires local governments to treat similarly situated telecommunications providers in a "competitively neutral and nondiscriminatory" manner; it does not require that all providers be treated identically. Clearly, a valid distinction exists between an ILEC serving the overwhelming majority of residential subscribers and all other providers. When providers offer different services as compared with other providers, local governments must maintain the flexibility to create reasonable regulatory schemes that address the

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[8] Indeed, the language of Section 253 specifically was adopted by Congress to replace language that would have supported such a claim. See *supra* p. 10.

particular issues raised by that service offering and its impact on the local government's property and constituents.

If for some reason the Commission believes that Section 253 requires that Bell Atlantic and the numerous competitive telecommunications providers serving the City be treated similarly, the Commission still can ensure that the City is not irrevocably burdened by a nineteenth century legislative pronouncement that immunized Bell Atlantic's ancestor from franchise obligations.[9] Under Section 271(d)(3)(C) of the Act, the Commission may not approve an RBOC's request to offer in-region interLATA service unless it finds that "the requested authorization is consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The public interest component of Section 271(d)(3)(C) requires the Commission to decide whether granting Bell Atlantic in-region interLATA authority is consistent with the Act's core competitive goals. Requiring Bell Atlantic to waive its alleged immunity from franchise requirements as part of its Section 271 authorization process would ameliorate any competitive imbalance the Commission finds would be created by allowing Bell Atlantic to use public rights-of-way in the City without meeting the same franchising obligations as others. Based on such a Commission finding, it would be both reasonable and fair – and manifestly in the public interest – for the Commission to insist that Bell Atlantic agree to play by the same rules as other telecommunications providers.

[9] The City does not concede that Bell Atlantic has an on-going, legally enforceable right to use the City's rights-of-ways without a modern franchise agreement similar to those entered into by ten competitive carriers. However, Bell Atlantic takes a contrary position and has not been willing to pursue or negotiate such an agreement.

This solution would honor Section 253's unambiguous goal of permitting local governments to retain their historical control over public property, because it would permit the City to negotiate a modern franchise agreement with Bell Atlantic that reflects the realities of the current competitive environment. It also would prevent all carriers from claiming an entitlement to the "lowest common denominator" that was imposed over a century ago in circumstances that do not even remotely exist today. If the Commission believes that Section 253 mandates similar treatment for carriers that are not similarly situated – a position with which the City vigorously disagrees, because it would unlawfully constrain local government authority contrary to Congress' intent – then at least the Commission, pursuant to Section 271(d)(3)(C), can satisfy its concerns while also allowing local governments to impose reasonable and fair franchise requirements on all carriers. Even if the Commission accepts the City's position with respect to Section 253, it still may make sense, in light of competitive concerns, to require Bell Atlantic to negotiate a contemporary franchise agreement as part of its efforts to obtain in-region interLATA authority. The City reserves the right to comment on these issues as they come before the Commission in the Bell Atlantic Section 271 proceedings.

III. Section 253 Preserves Substantial Authority for Local Government

The purpose of Section 253 is to ensure that state and local governments do not become entry barriers to companies seeking to provide telecommunications services. As evident from the robust competition that the City has experienced, the City's franchising policies, terms and conditions and compensation levels have not been a barrier to entry.

The City has conditioned entry on a carrier's agreement to comply with reasonable franchising terms and conditions that fall squarely within the City's right-of-way management authority. The City's franchise agreements for comparable providers are substantially similar. Typically, the City's agreements run for a 15-year term and define the franchise area; they require payment of a franchise fee equal to 5% of gross revenue; and, on a case-by-case basis, they provide for certain in-kind compensation, including dark fiber for City use, drops to public and governmental facilities, and support for equipment purchased by the City and maintenance of that equipment. The agreements also contain provisions relating to, among other things, indemnification and insurance; performance bonds and a security fund; compliance with applicable local, state and federal laws and regulations; construction requirements; and termination and breach. The agreements contain restrictions on the transfer of the system or of the franchisee without the City's prior consent. In connection with the City's review of a carrier's request for a franchise, the City may request and review financial information relating to the carrier; the proposed location of the system and schedule of construction; and the carrier's past history of compliance with applicable laws and performance of its contractual obligations.

The City believes that each of the types of provisions or subject areas listed above is properly within its management authority preserved by Section 253(c). To the extent any court case interprets Section 253(c) differently, that case is wrong. For example, the court in Prince George's suggested that a City's request for financial information may be beyond the scope of local authority because such a request somehow "prohibits" entry into the marketplace. See Prince George's, 1999 WL 343646 at *8. That interpretation is inconsistent with the law and the facts. Surely, the City must have the right to determine whether a carrier is financially capable of complying with such reasonable City requirements as obtaining bonds and insurance, repairing damage caused to the streets and surface structures and relocating parts of the system when necessary or appropriate. It is inconceivable that the City would have to permit a company on the verge of bankruptcy, or a company that has repeatedly failed in other jurisdictions to comply with repair or construction obligations, to cut the streets of Manhattan – which contain multiple layers of conduit, duct work, fibers, cables, and sophisticated utility equipment that are the nerve center of the City. The City believes it would fail in its fiduciary obligation to protect the public, if it did not ensure that a company does not pose an undue risk to the daily functioning of the City and the health, safety and welfare of the public. Congress surely did not intend that result.

The Commission should clarify that Section 253(c) gives franchising authorities sufficient flexibility to protect their rights-of-way as they deem most appropriate under the prevailing facts and circumstances. The Commission should resist the narrow reading of Section 253(c) adopted by some courts that would restrict a local franchising authority's ability to determine from a range of reasonable options the best way to protect and preserve public assets.[10] Local conditions vary. Local governments need to be able to take those conditions into consideration when fashioning appropriate local franchising requirements.

While the City believes that Section 253(c) encompasses the provisions and activities described earlier, the City further believes that such provisions and activities are

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[10] For example, one jurisdiction may seek little or no financial information but may require significant amounts of insurance, bonds or security funds. Another jurisdiction may choose to limit such requirements if they have other financial assurances, such as guarantees or financial information. Jurisdictions must be able to choose the approach that best protects legitimate local interests.

also clearly permitted under Section 253(a). Section 253(a) establishes the legal boundary of state and local authority in this area. Section 253(c) creates a "safe harbor" for local government action. Nothing in the Act, however, suggests that Section 253(c) articulates the full extent of local authority.

Thus, the City, if it determined that it was appropriate to do so and permissible under law, could go beyond the types of provisions that it has in its franchise agreements as long as such additional provisions do not prohibit or have the effect of prohibiting market entry under Section 253(a). The City has chosen not to expand beyond the types of franchise provisions described above. Should the City choose to do so, however, the relevant test on the limits of City authority would be whether the proposed local action is or has the effect of being an entry barrier.

Unfortunately, some recent court decisions have misconstrued Section 253 by narrowly restricting local governments to the matters in subpart (c).[11] While we agree that local governments should not duplicate the work of state public utility commissions,[12] these decisions have read Section 253(c) far too narrowly. Indeed, this reading of the Act conflicts with the plain language of Section 253(a) – the only subsection that affirmatively limits the authority of local governments. That section does not contain a

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[11] For example, one court found that certain requirements in franchise applications were invalid because they were "totally unrelated to use of the city's rights-of-way and thus are beyond the scope of the City's authority." Dallas I, 8 F. Supp.2d at 593. Similarly, the Prince George's court found that the franchise provisions at issue "attempts to regulate telecommunications companies in ways that exceed the County's allowable authority 'to manage the public rights of way.'" Prince George's, 1999 WL 343646 at *9.

[12] See In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 FCC Rcd. 21,396, ¶ 104 (1997) ("Our concern is that some localities appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of telecommunications regulations which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunication service is offered to the public.").

broad-based ban on local government action; rather it bars regulations or requirements that "prohibit or have the effect of prohibiting" an entity from providing telecommunications services. Thus, any local requirements, including, but not limited to, those relating to managing rights-of-way and obtaining compensation, are permissible so long as they do not actually or effectively prohibit carriers from providing service.

In sum, the Commission should clarify that Section 253 is not to be narrowly construed, but rather interpreted to give local governments sufficient flexibility to protect public rights-of-way in the manner they deem most appropriate in light of local facts and circumstances. Further, the Commission should clarify that while Section 253(c) is a "safe harbor" of clearly permissible local authority, Section 253(a) establishes the legal test for defining the full scope of local authority with respect to the use of public rights-of-way.

CONCLUSION

In an effort to strike an appropriate balance between the Act's twin aims of promoting a competitive telecommunications market and preserving traditional local government authority, and for all of the reasons set forth in the foregoing sections, the City respectfully requests that the Commission adopt the interpretations of Section 253 of the Act set forth herein.

Dated: August 13, 1999.

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